

# **EXHIBIT D**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE: MIRANT CORP.	)	DOCKET NO. 1:03-CV-1027-RWS
ERISA, ET AL.	)	
PLAINTIFFS	)	ATLANTA, GEORGIA
	)	
V.	)	NOVEMBER 16, 2006
	)	
MIRANT CORPORATION, ET AL	)	
DEFENDANTS.	)	
	)	
	)	
	)	

TRANSCRIPT OF FINAL APPROVAL HEARING  
BEFORE THE HONORABLE RICHARD W. STORY  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:

GERALD WELLS, ESQ.  
DEREK W. LOESER, ESQ.  
GARY GOTTO, ESQ.  
JOSEPH H. MELTZER, ESQ.  
JOSHUA A. MILLICAN, ESQ.

FOR THE DEFENDANTS:

HOWARD DOUGLAS HINSON, ESQ.  
MICHAEL G. MONNOLLY, ESQ.

COURT REPORTER:

SHARON D. UPCHURCH  
2114 U. S. COURTHOUSE  
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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT  
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1 P R O C E E D I N G S

2 (NOVEMBER 16, 2006; IN OPEN COURT)

3 THE COURT: GOOD MORNING. WE ARE HERE FOR PURPOSES  
4 OF A FINAL HEARING ON THE SETTLEMENT IN THIS MATTER. AND I  
5 HAVE, OF COURSE, RECEIVED A MOTION AND OTHER DOCUMENTATION  
6 SUBMITTED BY COUNSEL; BUT I WILL HEAR FROM PLAINTIFF AT THIS  
7 TIME. MR. WELLS, IF YOU WANT TO PROCEED ON BEHALF OF THE  
8 PLAINTIFF.

9 MR. WELLS: GOOD MORNING, YOUR HONOR. WE ARE VERY  
10 PLEASED TO BE HERE. WE ARE HAPPY TO PRESENT TO THE COURT FOR  
11 FINAL APPROVAL THIS SETTLEMENT WHICH RESOLVES ALL CLAIMS IN THE  
12 MIRANT ERISA LITIGATION. THE SETTLEMENT IS A PRODUCT OF  
13 INTENSE NEGOTIATIONS BETWEEN THE PARTIES THAT INVOLVED AN  
14 EXPERIENCED NEGOTIATOR AND WAS DONE OVER THE COURSE OF SEVERAL  
15 MEDIATION SESSIONS AS WELL AS SUBSEQUENT TELEPHONE  
16 CONVERSATIONS AND THE LIKE.

17 PLAINTIFFS BELIEVE THAT THIS SETTLEMENT IS EXCELLENT  
18 BECAUSE IT RECOVERS A SUBSTANTIAL AMOUNT OF DAMAGES AND  
19 PROVIDES A CASH SETTLEMENT IN THE AMOUNT OF \$9.7 MILLION THAT  
20 WILL BE DISTRIBUTED ON A PRO RATA SHARE TO THE PLAN  
21 PARTICIPANTS; THAT IS, EACH PARTICIPANT WILL RECEIVE A PORTION  
22 OF THE SETTLEMENT IN PROPORTION TO THE TOTAL LOSSES THAT THEY  
23 SUSTAINED DUE TO THEIR HOLDINGS IN MIRANT STOCK AND THE MIRANT  
24 401K PLANS. THE SETTLEMENT ITSELF WAS REVIEWED EXTENSIVELY BY  
25 AN INDEPENDENT FIDUCIARY, FIDUCIARY COUNSELORS, INC. THAT

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1 REPORT WAS FINALIZED, AND WE SENT THAT TO YOUR HONOR FOR REVIEW  
2 YESTERDAY.

3 BEFORE THE COURT IS APPROVAL OF THE SETTLEMENT ITSELF  
4 AS WELL AS APPROVAL OF ATTORNEY'S FEES AND REIMBURSEMENT OF  
5 EXPENSES AS WELL AS CASE CONTRIBUTION AWARDS TO THE NAMED  
6 PLAINTIFFS. IF I MAY PROCEED, YOUR HONOR, WE WOULD LIKE TO GO  
7 DIRECTLY TO THE FAIRNESS OF THE SETTLEMENT.

8 THE COURT: YES, SIR.

9 MR. WELLS: THANK YOU. WOULD YOUR HONOR LIKE A BRIEF  
10 HISTORY OF THE LITIGATION ITSELF OR SHALL WE PROCEED?

11 THE COURT: YOU MAY PROCEED TO THE FAIRNESS.

12 MR. WELLS: UNDERSTOOD, YOUR HONOR.

13 THE SETTLEMENT FACTORS THAT ARE CONSIDERED, YOUR  
14 HONOR, ARE THE BENNETT FACTORS THAT WERE ENUMERATED BY THE  
15 ELEVENTH CIRCUIT. AND THOSE SIX FACTORS IN ORDER ARE AN  
16 ASSESSMENT OF THE LIKELIHOOD THAT PLAINTIFFS WOULD PREVAIL AT  
17 TRIAL. I SUBMITTED IN OUR PAPERS, YOUR HONOR, ALTHOUGH  
18 PLAINTIFFS BELIEVE VERY STRONGLY IN THIS CASE AND IN THE MERITS  
19 OF THIS CASE, PLAINTIFFS UNDERSTAND THAT NO PLAINTIFF HAS  
20 RECOVERED WHEN A CASE HAS BEEN TAKEN THROUGH TRIAL. THAT BEING  
21 SAID, PLAINTIFFS DO BELIEVE STRONGLY IN THEIR CLAIMS AND THAT  
22 THEY WOULD, IN FACT, BE ABLE TO PREVAIL. HOWEVER, GIVEN THE  
23 CASE LAW OUT THERE AS WELL AS THE SETTLEMENT AMOUNT ITSELF, WE  
24 BELIEVE THAT THIS FACTOR MILITATES IN APPROVING THE SETTLEMENT.

25 THE SECOND FACTOR IS THE RANGE OF POSSIBLE RECOVERY.

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1 HERE, YOUR HONOR, I SUBMITTED IN OUR PAPERS DAMAGES RANGE FROM  
2 THE MAXIMUM POSSIBLE RECOVERY OF APPROXIMATELY \$30 MILLION

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3 TO -- AND THAT IS A BREACH DATE AT THE INCEPTION OF THE CLASS  
4 PERIOD -- TO A DAMAGE PERIOD OF ABOUT \$11 MILLION IF YOUR HONOR  
5 WOULD FIND THAT THE BREACH DATE, THAT IS, WHEN MIRANT STOCK WAS  
6 IMPRUDENT, WAS NOT UNTIL SEPTEMBER OF 2002; AND DAMAGES THEN  
7 RANGE IN THE NEIGHBORHOOD OF \$11 MILLION. HOWEVER, IF THE  
8 BREACH DATE WAS TAKEN EVEN FURTHER OUT, FOR INSTANCE, INTO MAY  
9 OF '03 WHEN THE GOING CONCERN ISSUE REGARDING MIRANT WAS  
10 ISSUED, DAMAGES WOULD BE SUBSTANTIALLY LOWER.

11 THAT BEING SAID, YOUR HONOR, PLAINTIFFS HAVE  
12 RECOVERED ANYWHERE FROM THE MAXIMUM OF 30 PERCENT OF THE  
13 RECOVERY TO UPWARDS OF 88 PERCENT OF THE RECOVERY. THAT IN  
14 ITSELF, WE THINK, SPEAKS HIGHLY OF THE SETTLEMENT AND, AGAIN,  
15 FACTORS STRONGLY IN APPROVING THE SETTLEMENT.

16 THE THIRD FACTOR, YOUR HONOR, IS CONSIDERATION  
17 PROVIDED TO CLASS MEMBERS PURSUANT TO THE SETTLEMENT AS  
18 COMPARED TO THE RANGE OF POSSIBLE RECOVERY. AGAIN, YOUR HONOR,  
19 THE CONSIDERATION HERE IS BETWEEN 30 PERCENT AND 88 PERCENT OF  
20 THE TOTAL DAMAGES. WE, AGAIN, BELIEVE THAT THIS FACTORS  
21 STRONGLY IN APPROVING THE SETTLEMENT.

22 THE FOURTH IS THE COMPLEXITY, EXPENSE AND POSSIBLE  
23 DURATION OF THE LITIGATION HAD IT PROCEEDED. AS YOUR HONOR IS  
24 WELL AWARE, THE CASE WAS ADMINISTRATIVELY CLOSED AFTER BRIEFING  
25 ON DEFENDANT'S MOTIONS TO DISMISS AS WELL AS MOTION ON JUDGMENT

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1 OF THE PLEADINGS WAS COMPLETED. THAT BEING SAID, IF THIS  
2 LITIGATION WERE TO CONTINUE, THOSE MOTIONS WOULD HAVE TO BE  
3 DECIDED; DISCOVERY, WHICH WOULD BE INTENSE BECAUSE THE

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4 DISCOVERY WOULD FACTOR IN TWO SUCH THINGS AS WHETHER OR NOT  
5 MIRANT WAS A PRUDENT INVESTMENT FOR PLANS FROM THE INCEPTION,  
6 WHETHER OR NOT THE DEFENDANTS THAT WE ALLEGED IN OUR COMPLAINT  
7 WERE, IN FACT, FIDUCIARIES OF THE PLAN AND EXERCISED CONTROL  
8 AND WERE ABLE TO, IN FACT, DIVEST THE PLANS OF MIRANT STOCK;  
9 THROUGH SUMMARY JUDGMENT WHICH, AGAIN, WOULD BE VERY FACT  
10 INTENSIVE, AND AS WE HAVE NOTED, THERE ARE A NUMBER OF  
11 DECISIONS THAT GO BOTH IN FAVOR OF PLAINTIFFS AS WELL AS  
12 AGAINST PLAINTIFFS IN THIS CASE; AND THROUGH TRIAL.

13 CONSERVATIVELY, YOUR HONOR, WE WOULD ESTIMATE THAT  
14 TRIAL THROUGH LITIGATION WOULD ESTIMATE BETWEEN THREE OR FOUR  
15 YEARS. AGAIN, THIS EARLY SETTLEMENT IN THIS STAGE OF  
16 LITIGATION FACTORS IN FAVOR OF APPROVING THE SETTLEMENT.

17 THEN THE FIFTH FACTOR, YOUR HONOR, IS THE NATURE AND  
18 EXTENT OF ANY OBJECTIONS TO THE SETTLEMENT. AS WE SUBMITTED,  
19 THERE IS ONLY ONE OBJECTION SUBMITTED BY ARTHUR LANKFORD TO THE  
20 SETTLEMENT ITSELF. NOTABLY, YOUR HONOR, THE CLASS MEMBER DOES  
21 NOT OPPOSE APPROVAL OF THE ATTORNEY'S FEES WHICH THE ORIGINAL  
22 REQUESTED WERE 30 PERCENT, NOR DOES HE OPPOSE REIMBURSEMENT OF  
23 EXPENSES OR THE CASE CONTRIBUTION AWARDS TO NAMED PLAINTIFFS.  
24 RATHER, IN HIS LETTER HE SAID THAT THE SETTLEMENT SHOULD BE  
25 HIGHER BECAUSE CERTAIN DEFENDANTS RECEIVED GOLDEN PARACHUTES.

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1 RESPECTFULLY, YOUR HONOR, ALL PLAINTIFFS' COUNSEL  
2 AGREE THAT THE SETTLEMENT SHOULD BE HIGHER. HOWEVER, GIVEN THE  
3 OTHER FACTORS HERE AS WELL AS THE CASE LAW AS IT CURRENTLY  
4 STANDS, THIS IS A SETTLEMENT THAT WE SIMPLY COULD NOT TURN OUR  
5 BACK ON. MOREOVER, OVER 3500 NOTICES WERE SENT OUT TO CLASS

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6 MEMBERS, AND ONLY ONE PERSON FOUND OBJECTION. WE THINK THIS  
7 COUNSELS IN FAVOR OF APPROVING THE SETTLEMENT.

8 FINALLY, YOUR HONOR, THE STATE OF PROCEEDINGS IN  
9 WHICH THE SETTLEMENT WAS REACHED. AS I STATED EARLIER,  
10 BRIEFING ON THE MOTION TO DISMISS WAS COMPLETED. HOWEVER, THIS  
11 WOULD STILL BE A VERY LONG ROW TO HOE, AS WELL AS THE FACT THAT  
12 WE CLEARLY UNDERSTOOD THE POSITIONS OF THE RESPECTIVE PARTIES  
13 THROUGH THE MEDIATION EFFORTS. MEDIATION SUBMISSIONS WERE  
14 SUBMITTED TO THE MEDIATOR, AND MEDIATION SESSIONS TOOK OVER  
15 THREE DAYS IN TWO SEPARATE SESSIONS.

16 COMBINED, YOUR HONOR, WE THINK EACH OF THE SIX  
17 FACTORS ENUMERATED IN BENNETT SEPARATELY, AS WELL AS COMBINED,  
18 FACTOR IN APPROVING THIS SETTLEMENT; AND WE SUBMIT THIS  
19 SETTLEMENT FOR APPROVAL.

20 THE COURT: I WILL HEAR FROM YOU, AS WELL, ON THE  
21 REQUEST FOR ATTORNEY'S FEES AND EXPENSES.

22 MR. WELLS: BEFORE WE TURN TO THAT, YOUR HONOR, THERE  
23 IS THE ISSUE OF CERTIFICATION OF CLASS; AND WE WOULD SUBMIT TO  
24 THE COURT AS WE SUBMITTED IN THE PAPERS THAT SETTLEMENT HERE IN  
25 CERTIFICATION OF A (B)(1) CLASS IS APPROPRIATE GIVEN THE NATURE

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1 OF THE PLAN-WIDE BREACH AND THE HARM SUBMITTED.

2 WITH RESPECT TO THE REQUEST FOR ATTORNEY'S FEES, WE  
3 WOULD PUT FORTH THAT EACH OF THE 12 FACTORS, JOHNSON FACTORS,  
4 FAVOR IN APPROVING THIS SETTLEMENT. THE FIRST FACTOR IS THE  
5 TIME AND LABOR REQUIRED. AS PUT FORTH IN OUR PAPERS, OVER 2700  
6 HOURS OF BOTH ATTORNEY AND PROFESSIONAL TIME WAS COMMITTED TO



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7 THIS CASE. THOSE ARE SUBSTANTIAL RESOURCES WITH A LODESTAR  
8 THAT AT THIS POINT IS JUST OVER 1.17 MILLION.

9 THE SECOND FACTOR, YOUR HONOR, IS THE NOVELTY AND  
10 DIFFICULTY OF THE QUESTIONS PRESENTED. AS STATED BY MANY  
11 COURTS, ERISA CASES IN PARTICULAR AND CLASS ACTIONS IN GENERAL  
12 ARE COMPLEX CASES THAT REQUIRE SPECIALIZED EXPERTISE AS WELL AS  
13 A GREAT DEAL OF, FOR LACK OF A BETTER TERM, HEAVY LIFTING ON  
14 BEHALF OF PLAINTIFF'S COUNSEL. WE SUBMIT THAT WE'VE DONE THAT  
15 HERE AND THAT THE SETTLEMENT EXEMPLIFIES THAT.

16 THIRD IS THE SKILL REQUISITE TO PERFORM THE LEGAL  
17 SERVICES. HERE, YOUR HONOR, CLASS COUNSEL, AS STATED BY  
18 INDEPENDENT FIDUCIARY, ARE SOME OF THE -- ARE TWO OF THE FIRMS  
19 THAT ARE AT THE FOREFRONT OF THIS TYPE OF LITIGATION AND HAVE  
20 PUT FORTH TREMENDOUS EFFORT; AND IT IS THROUGH OUR EFFORT THAT  
21 THE SETTLEMENT WAS ABLE TO BE ACHIEVED.

22 FOURTH, YOUR HONOR, IS THE PRECLUSION OF OTHER  
23 EMPLOYMENT. RESPECTFULLY, OVER 2700 HOURS WERE EXPENDED SOLELY  
24 ON THIS CASE. THOSE 2700 HOURS COULD HAVE BEEN PUT FORTH ON  
25 OTHER MATTERS THAT HAD A GREATER LIKELIHOOD OF RECOVERY.

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1 WHAT IS UNIQUE TO THIS CASE IS, UNLIKE ANY OTHER, TO  
2 MY KNOWLEDGE, FIDUCIARY BREACH CASE OUT THERE, WE HAVE ASSERTED  
3 THAT THE COMPANY STOCK WAS IMPRUDENT FROM THE INCEPTION. THAT  
4 IS A UNIQUE FACTOR TO THIS CASE THAT WE THINK, WHILE WE COULD  
5 HAVE PROVED AT TRIAL, WOULD RAISE OTHER SUBSTANTIAL HURDLES  
6 UNLIKE ANY OTHER CASE AND BECAUSE OF THESE UNIQUE FACTORS,  
7 AGAIN, COUNSELS IN FAVOR OF APPROVING THE SETTLEMENT.

8 THE FIFTH FACTOR, YOUR HONOR, IS THE CUSTOMARY FEE.



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9 AS THE ELEVENTH CIRCUIT PUT FORTH IN CAMDEN I, THE CUSTOMARY  
10 FEE IN COMMON FUND CASES IS BETWEEN 20 AND 30 PERCENT OF THE  
11 TOTAL SETTLEMENT RECOVERED. HERE PLAINTIFFS ARE REQUESTING  
12 27-AND-A-HALF PERCENT OF THE COMMON FUND.

13 THE SIXTH FACTOR IS WHETHER THE FEE IS FIXED OR  
14 CONTINGENT. PLAINTIFF'S COUNSEL TOOK THIS FEE -- TOOK THIS  
15 CASE, RATHER, COMPLETELY ON A CONTINGENT-FEE BASIS; THAT IS,  
16 HAD THERE BEEN NO RECOVERY OBTAINED, WE WOULD HAVE BEEN WITHOUT  
17 RECOURSE. WE HAVE FURTHER PUT FORTH OVER \$52,000 WORTH OF  
18 EXPENSES WITH NO GUARANTEE THAT THOSE EXPENSES WOULD BE  
19 REIMBURSED. AGAIN, OVER 2700 HOURS WITH A LOADSTAR OF 1.17  
20 MILLION AS WELL AS OUT-OF-POCKET EXPENSES THAT COULD HAVE BEEN  
21 PUT FORTH TO CASES WITH A SUBSTANTIALLY HIGHER LIKELIHOOD OF  
22 RECOVERY COUNSELS IN FAVOR OF APPROVING THIS SETTLEMENT.

23 THE SEVENTH FACTOR, YOUR HONOR, IS THE TIME  
24 LIMITATIONS IMPOSED BY THE CLIENT UNDER THE CIRCUMSTANCES.  
25 RESPECTFULLY, YOUR HONOR, CLASS COUNSEL READILY ADMITS THAT

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1 THIS IS A CLASS CASE; AND, THEREFORE, THE CLIENT EXPECTATIONS  
2 WERE THAT THEY WOULD LIKELY RECOVER, AND THERE WAS NO FIX DATE.

3 MOVING ON, YOUR HONOR, TO THE EIGHTH FACTOR, THE  
4 AMOUNT INVOLVED AND THE RESULTS OBTAINED. AS I STATED EARLIER,  
5 THE TOTAL OUTWARD RECOVERY IS BETWEEN A MAXIMUM OF 30 MILLION  
6 TO A MORE REALISTIC NUMBER OF 11 MILLION. HERE THE \$9.7  
7 MILLION RESULTS IN A SUBSTANTIAL AMOUNT OF THE RECOVERY.

8 THE NINTH FACTOR, YOUR HONOR, IS THE EXPERIENCE,  
9 REPUTATION AND THE ABILITY OF THE ATTORNEYS. AS PUT FORTH AND

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10 SEEN IN OUR PAPERS, AS WELL AS THE COMMENTS MADE BY THE  
11 INDEPENDENT FIDUCIARY, THESE FIRMS HERE BEFORE YOUR HONOR ARE  
12 AT THE FOREFRONT OF THIS TYPE OF PRACTICE AND HAVE USED THEIR  
13 KNOWLEDGE HERE TO PUT FORTH AND GO AGAINST SOME OF THE MOST  
14 EMINENT DEFENSE ATTORNEYS WITH RESPECT TO THIS FIELD AND WERE  
15 ABLE TO PUSH FOR AND ACHIEVE THIS MAGNIFICENT SETTLEMENT.

16 THE TENTH FACTOR, YOUR HONOR, IS THE UNDESIRABILITY  
17 OF THIS CASE. YOUR HONOR, HERE CLEARLY THIS WAS A BANKRUPTCY  
18 CASE; SO YOU HAD THE ISSUES INHERENT IN BANKRUPTCY WHICH  
19 PLAINTIFF'S COUNSEL WENT THROUGH AND SPENT SUBSTANTIAL TIME IN  
20 DEALINGS IN THE BANKRUPTCY COURT ENSURING THAT THE SETTLEMENT  
21 HERE WAS PRESERVED AND THESE CLAIMS WERE PRESERVED.

22 FURTHER, YOUR HONOR, BECAUSE OF THE NATURE OF THE  
23 CASE, ASSERTING THAT IMPRUDENCE WAS FROM THE INCEPTION, THIS,  
24 TOO, COUNSELS IN FAVOR THAT THIS CASE WAS, IN FACT, UNDESIRABLE  
25 IN THAT IT WAS NOT THE EASIEST CASE, IT WAS NOT THE EASIEST

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1 ERISA CASE, AND IT HAD UNIQUE FACTORS.

2 THE ELEVENTH FACTOR, YOUR HONOR, IS THE NATURE AND  
3 LENGTH OF THE PROFESSIONAL RELATIONSHIP WITH THE CLIENT.  
4 AGAIN, RESPECTFULLY, YOUR HONOR, THIS IS A CLASS CASE; AND WE  
5 SUBMIT THAT WHILE OUR CLIENTS HAVE BEEN FULLY INFORMED AND  
6 ADVISED OF THE CASE THROUGHOUT THE COURSE OF THE LITIGATION,  
7 THIS IS NOT AN ONGOING RELATIONSHIP.

8 MOVING, YOUR HONOR, TO THE FINAL AND TWELFTH FACTOR,  
9 THE AWARDS IN SIMILAR CASES. AS PUT FORTH IN OUR PAPERS, THERE  
10 ARE NUMEROUS CASES OUT THERE IN WHICH SIGNIFICANTLY HIGHER  
11 PERCENTAGES WERE OBTAINED AND ACHIEVED IN SIMILAR ERISA CASES;

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12 NOTABLY, ADC AND WESTSTAR IN WHICH 30 PERCENT RECOVERY WAS  
 13 APPROVED. HOWEVER, YOUR HONOR, AGAIN, AS NOTED BEFORE, THE  
 14 ELEVENTH CIRCUIT HAS SAID BETWEEN 20 AND 30 PERCENT IS  
 15 APPROPRIATE. HERE WE SUBMIT THAT OUR REQUEST FOR 27-AND-A-HALF  
 16 PERCENT, IT FALLS WITHIN THAT NORM; AND AS DEMONSTRATED BY THE  
 17 AMOUNT OF WORK PUT INTO THE CASE AND THE END RESULT ACHIEVED,  
 18 THAT THIS FACTORS IN FAVOR OF APPROVING THE SETTLEMENT.

19 YOUR HONOR, THE ELEVENTH CIRCUIT HAS NOTED IN CAMDEN  
 20 THAT THERE ARE SEVERAL OTHER FACTORS THAT MAY BE UTILIZED IN  
 21 DETERMINING WHETHER OR NOT A SETTLEMENT IS APPROPRIATE; AND IF  
 22 YOUR HONOR WOULD LIKE, I CAN GO THROUGH THOSE FIVE ADDITIONAL  
 23 FACTORS.

24 YOUR HONOR, THE FIRST ONE IS THE TIME REQUIRED TO  
 25 REACH SETTLEMENT. AS I STATED EARLIER, THIS INVOLVED TWO

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1 FORMAL MEDIATION SESSIONS, THE FIRST MEDIATION SESSION  
 2 OCCURRING IN APRIL OF '05. THAT WAS A TWO-DAY ALL-DAY  
 3 MEDIATION SESSION. PRIOR TO THAT SESSION, THERE WERE NUMEROUS  
 4 PHONE CALLS AND TELEPHONIC CONFERENCES WITH BOTH THE MEDIATOR  
 5 AS WELL AS DEFENSE COUNSEL TRYING TO SEE IF SETTLEMENT MAY BE  
 6 AN APPROPRIATE AVENUE. SUBSEQUENT TO THE APRIL MEDIATION,  
 7 THERE WAS ANOTHER ALL-DAY MEDIATION IN NOVEMBER OF 2005; AND  
 8 THAT WAS ABLE TO PUSH THE CASE FURTHER ALONG. HOWEVER,  
 9 SETTLEMENT WAS NOT OBTAINED UNTIL EARLY OF 2006. THAT  
 10 DEMONSTRATES THAT THERE WAS SUBSTANTIAL TIME PUT FORTH IN  
 11 OBTAINING THE SETTLEMENT.

12 THE SECOND ONE IS WHETHER OR NOT THERE ARE ANY

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13 SUBSTANTIAL OBJECTORS BY THE CLASS. AGAIN, THERE'S ONLY ONE  
14 OBJECTOR FROM THE CLASS OF OVER 3500.

15 THE THIRD IS WHETHER OR NOT THERE'S ANY NONMONETARY  
16 BENEFITS CONFERRED UPON THE SETTLEMENT CLASS. HERE, YOUR  
17 HONOR, AS PUT FORTH IN THE STIPULATION OF SETTLEMENT, THERE IS  
18 A SPECIFIC CARVE-OUT SAYING THAT THE RECOVERY HERE WILL IN NO  
19 WAY AFFECT THE SECURITIES-RELATED -- SECURITIES LITIGATION, NOR  
20 WILL IT ADVERSELY AFFECT THE RELATED SOUTHERN ERISA LITIGATION.

21 THE FOURTH FACTOR, YOUR HONOR, IS THE ECONOMICS  
22 INVOLVED IN PROSECUTING THIS CASE. SIMPLY PUT, YOUR HONOR,  
23 CLASS CASES SUCH AS THIS WILL REQUIRE THE EXPENDITURE OF TENS  
24 OF THOUSANDS, IF NOT HUNDREDS OF THOUSANDS OF DOLLARS. BECAUSE  
25 WE WERE ABLE TO ACHIEVE THE SETTLEMENT RELATIVELY EARLY IN THAT

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1 PROCESS, WE WERE ABLE TO KEEP EXPENSES TO A MINIMUM; BUT WE DID  
2 PUT FORTH EXTREME AMOUNTS OF MONEY.

3 THE FIFTH IS ARE THERE ANY OTHER FACTORS UNIQUE TO  
4 THIS CASE. AS I SAID EARLIER, THIS INVOLVES A BANKRUPTCY CASE  
5 AS WELL AS IMPRUDENCE FROM THE INCEPTION. BOTH OF THOSE  
6 FACTORS ARE UNIQUE TO THIS ERISA CASE AND STRONGLY SUPPORT THIS  
7 SETTLEMENT.

8 THE COURT: THANK YOU.

9 MR. WELLS: YOUR HONOR, IN ADDITION, THERE IS ALSO  
10 THE MATTER OF THE REIMBURSEMENT OF EXPENSES, IF YOU'D LIKE ME  
11 TO ADDRESS THAT.

12 AS PUT FORTH IN OUR PAPERS, WE HAVE EXPENDED OVER  
13 \$52,000 WORTH OF EXPENSES THAT INCLUDE THE LIKES OF TRAVEL,  
14 LODGING, FILINGS AND THE LIKE. WE THINK THEY ARE REASONABLE

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15 AND APPROPRIATE, AND WE NOTE FOR YOUR HONOR THAT THERE'S BEEN  
16 NO OBJECTION TO THE REIMBURSEMENT OF EXPENSES.  
17 THE OTHER MATTER BEFORE YOUR HONOR IS THE ISSUE OF  
18 THE CASE CONTRIBUTION AWARD. AS PUT FORTH IN OUR PAPERS, CASE  
19 CONTRIBUTION AWARDS IN THIS CASE, ON THESE TYPE OF CASES, ARE  
20 EMINENTLY REASONABLE BECAUSE THESE PLAINTIFFS -- BUT FOR THESE  
21 PLAINTIFFS, THIS CASE WOULD NOT BE BROUGHT. THESE PLAINTIFFS  
22 WERE ABLE TO STEP FORWARD, PROVIDE PLAN DOCUMENTS TO CLASS  
23 COUNSEL, PROVIDE INFORMATION TO CLASS COUNSEL AS TO THE INNER  
24 WORKINGS OF BOTH THE COMPANY IN GENERAL AS WELL AS THE PLANS IN  
25 PARTICULAR.

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1 AND WITH THESE CASES, THEY HAVE HELPED FOSTER AND  
2 ACHIEVE A \$9.7 MILLION SETTLEMENT THAT WOULD BENEFIT OVER 3500  
3 CLASS MEMBERS; AND WE THINK THEIR EFFORTS SHOULD BE RECOGNIZED  
4 AND AWARDED BY THIS COURT. RESPECTFULLY, YOUR HONOR, WE ASK  
5 THAT A CASE CONTRIBUTION AWARD OF \$2,000 FOR EACH OF THE TWO  
6 NAMED PLAINTIFFS BE APPROVED.

7 AND WITH THAT, YOUR HONOR, IF THE COURT HAS ANY  
8 QUESTIONS, I WOULD BE HAPPY TO ADDRESS THOSE.

9 THE COURT: I DO NOT. THANK YOU.

10 MR. HINSON, ANYTHING FROM THE DEFENDANT?

11 MR. HINSON: YOUR HONOR, AS WE SAID IN OUR WRITTEN  
12 SUBMISSION, WE ONLY WOULD ADD THAT WE BELIEVE WE WOULD PREVAIL  
13 HAD THE LITIGATION MOVED FORWARD; AND WE BELIEVE THAT IN THAT  
14 LIGHT, THIS DEFENSE -- I MEAN THIS SETTLEMENT IS, IN FACT, A  
15 FAIR AND REASONABLE SETTLEMENT. WE TAKE NO POSITION ON THE

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16 ATTORNEY'S FEES ISSUES. AND, THEREFORE, WE HAVE VERY LITTLE TO  
17 ADD.

18 THE COURT: THANK YOU. I WOULD NOTE FOR THE RECORD  
19 AND AS HAS BEEN ALLUDED TO BY MR. WELLS, THERE WAS ONE  
20 OBJECTION FILED TO THE SETTLEMENT BY MR. LANKFORD. AND THE  
21 COURT HAS REVIEWED THAT OBJECTION; AND LIKE MR. WELLS, I  
22 UNDERSTAND MR. LANKFORD'S DISSATISFACTION WITH THE TOTAL AMOUNT  
23 THAT WILL BE COMING TO HIM AS A MEMBER OF THIS CLASS. I CAN  
24 UNDERSTAND AND APPRECIATE HIS CONCERN, HAVING LOST A  
25 SUBSTANTIAL AMOUNT OF HIS LIFE SAVINGS. HOWEVER, WHILE I

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1 APPRECIATE HIS POSITION, I DO NOT THINK IT JUSTIFIES REJECTION  
2 OF THE SETTLEMENT.

3 FOR THE REASONS THAT HAVE BEEN STATED, I DO FIND THAT  
4 THE SETTLEMENT IS FAIR AND IS A GOOD SETTLEMENT FOR THE MEMBERS  
5 OF THE CLASS. CERTAINLY THE QUESTION OF LIABILITY, THE RANGE  
6 OF POTENTIAL RECOVERIES, PARTICULARLY THE DETERMINATION OF WHEN  
7 WE WOULD FIND THEY HAD BREACHED THEIR DUTIES REALLY COULD HAVE  
8 HAD A SUBSTANTIAL EFFECT. AND I KNOW PROBABLY FROM THE  
9 PERSPECTIVE OF NEGOTIATION, THAT HAD TO BE A DIFFICULT MATTER  
10 TO GRAPPLE WITH, AS WELL. BUT IT CERTAINLY MILITATES IN FAVOR  
11 OF THE SETTLEMENT THAT HAS BEEN REACHED.

12 I WILL APPROVE THE SETTLEMENT. I WILL CERTIFY THE  
13 CLASS AS A (B)(1) CLASS. I FIND THAT THE ATTORNEY'S FEES ARE  
14 ALSO REASONABLE. COUNSEL, CLASS COUNSEL, ARE OBVIOUSLY  
15 EMINENTLY QUALIFIED TO BRING AND PURSUE THIS LITIGATION. I  
16 THINK THAT WHEN ONE VIEWS THE LODESTAR INVOLVED IN THE CASE AS  
17 COMPARED TO THE AMOUNT OF RECOVERY, THIS IS A FAIR



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18 COMPENSATION, PARTICULARLY WHEN ONE CONSIDERS, AS WE DISCUSSED  
19 EARLIER, THE LIKELIHOOD OF SUCCESS, THE RISK THAT WAS ACCEPTED  
20 BY COUNSEL IN TAKING ON THIS LITIGATION AND TAKING IT ON  
21 TOTALLY ON A CONTINGENT-FEE BASIS; SO THEY BORE THE ENTIRE  
22 RISK. AND I THINK THERE IS A PUBLIC POLICY ISSUE AT STAKE HERE  
23 IN THAT COUNSEL NEED TO BE ENCOURAGED TO TAKE THESE CASES WHEN  
24 THEY'RE MERITORIOUS; AND IF THERE'S NOT FULL, COMPLETE AND  
25 APPROPRIATE COMPENSATION, THERE WILL NOT BE THAT INCENTIVE TO

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1 TAKE THESE CASES.

2 I DO APPRECIATE THE FACT THAT COUNSEL HAS ADJUSTED  
3 ITS REQUEST TO 27.5 PERCENT OF THE COMMON FUND, AND I WILL  
4 AWARD FEES OF 27.5 PERCENT OF THE COMMON FUND. I WILL ALSO  
5 AWARD TO COUNSEL THE FULL AMOUNT OF EXPENSES AS REQUESTED IN  
6 THE PAPERS FILED WITH THE COURT AND WILL ALSO MAKE THE CASE  
7 CONTRIBUTION AWARDS TO THE NAMED PLAINTIFFS OF \$2,000 EACH AS  
8 REQUESTED. I THINK THAT'S EMINENTLY FAIR FOR THE PEOPLE WHO  
9 CHOOSE TO ALLOW THEMSELVES TO BE PUT OUT THERE AS  
10 REPRESENTATIVES OF THE CLASS. AND WHILE I REALIZE IN A CASE OF  
11 THIS TYPE, THEY ARE NOT INTIMATELY INVOLVED IN THE PROCEEDINGS,  
12 THEY ARE THERE TO REPRESENT THEIR COLLEAGUES AND TO BE IN TOUCH  
13 WITH COUNSEL AND DO HAVE SOME RESPONSIBILITIES AND ROLES IN  
14 THAT REGARD. SO I THINK THAT'S A VERY FAIR AMOUNT TO PROVIDE  
15 TO THOSE TWO.

16 YOU HAD SUBMITTED PROPOSED ORDERS ON THESE MATTERS,  
17 AND I FIND THEM TO BE APPROPRIATE AND AM INCLINED TO EXECUTE  
18 THOSE AS SUBMITTED. THE QUESTION I WOULD HAVE IS THERE ARE



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19 BLANKS TO BE FILLED IN. I DID NOT KNOW IF YOU HAVE COMPLETED  
20 ONE THAT FILLS IN THE BLANKS OR IF YOU WANTED TO GET IT TO US  
21 BY E-MAIL AND WE WOULD DO IT.

22 MR. WELLS: YOUR HONOR, NOT TO BE PRESUMPTUOUS, BUT  
23 WE DID HAVE ONE THAT HAS THE BLANKS FILLED IN. I WOULD BE  
24 HAPPY TO SUBMIT IT TO YOUR HONOR.

25 THE COURT: I AM NOT OFFENDED BY YOUR PRESUMPTION AT

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1 ALL. I APPRECIATE IT, AS DOES MY STAFF.

2 MR. WELLS: THANK YOU, YOUR HONOR.

3 (PAUSE IN THE PROCEEDINGS.)

4 THE COURT: I HAVE SIGNED THE ORDER OF FINAL  
5 JUDGMENT, AND THIS WILL BE -- I'LL LET COUNSEL FILE IT WITH THE  
6 CLERK SINCE MY CLERK IS NOT HERE TODAY. HE'S OUT SICK. I'LL  
7 LET YOU FILE IT WITH THE CLERK.

8 LET ME, HOWEVER, CONCLUDE BY EXPRESSING TO COUNSEL  
9 FOR BOTH THE PLAINTIFFS AND THE DEFENDANT MY SINCERE  
10 APPRECIATION FOR YOUR LABORS IN THIS CASE. YOU POINTED OUT,  
11 MR. WELLS, THE LAYERS OF THIS LITIGATION AND THE FACT THAT YOU  
12 HAD THE BANKRUPTCY ASPECT OF THIS TO DEAL WITH AS WELL AS THE  
13 OTHER ISSUES THAT ARE INVOLVED IN THIS CASE. THIS WAS NOT A  
14 SIMPLE CASE. IT HAD THE EXTRA LAYERS THAT MADE IT MORE  
15 DIFFICULT.

16 BUT IT'S VERY CLEAR TO ME THAT ALL OF YOU WORKED VERY  
17 HARD AT THIS. NUMBER ONE, YOU HAD WORKED VERY HARD BEFORE I  
18 STAYED THE CASE IN THE MOTION PRACTICE THAT HAD ALREADY BEGUN.  
19 I AM CONFIDENT THAT YOU WOULD HAVE WORKED EQUALLY AS HARD HAD  
20 THE CASE BEEN REOPENED AND WE HAD GONE THROUGH THE DECIDING OF

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21 THOSE MOTIONS AND IF THE CASE SURVIVED, THE ENTIRE ROUTE THAT  
22 YOU'VE DESCRIBED, MR. WELLS, THROUGH SUMMARY JUDGMENT, TRIAL,  
23 ET CETERA. AND FROM A JUDGE'S PERSPECTIVE, IT'S JUST REALLY  
24 NICE TO HAVE LAWYERS WHO ARE CAPABLE, WHO ARE PROFESSIONAL, WHO  
25 WORK TOGETHER, WHO SEEK TO FIND A GOOD RESOLUTION TO A

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1 DIFFICULT CONFLICT; AND I FEEL THAT YOU HAVE IN THIS CASE.  
2 I FEEL VERY GOOD ABOUT THIS SETTLEMENT IN EVERY  
3 RESPECT. I THINK THE AMOUNT OF MONEY THAT'S GOING INTO THE  
4 POCKETS OF THE MEMBERS OF THE CLASS, WHILE, AGAIN, I WOULD LOVE  
5 TO SEE, AS I KNOW YOU WOULD, MORE MONEY GOING INTO THEIR  
6 POCKETS, THIS IS COMING OUT A LOT BETTER THAN WHAT COULD HAVE  
7 BEEN; AND I THINK YOU FOLKS HAVE DONE A GREAT JOB.  
8 AND I KNOW THAT THERE ARE OBSERVERS WHO WOULD  
9 CRITICIZE THE AMOUNT OF ATTORNEY'S FEES AND THEY WOULD SAY THIS  
10 IS ALL ABOUT LAWYERS MAKING MONEY. BUT THE REALITY IS IF YOU  
11 HAD REPRESENTED EVERY ONE OF THESE FOLKS INDIVIDUALLY, A 27.5  
12 CONTINGENT FEE WOULD HAVE BEEN A STEAL ON THEIR PARTS. THEY  
13 COULD NOT HAVE RETAINED COUNSEL TO REPRESENT THEM INDIVIDUALLY  
14 ON THAT KIND OF CONTINGENT FEE. NUMBER ONE, MOST OF THEIR  
15 CLAIMS WOULD NOT HAVE BEEN SUFFICIENT TO JUSTIFY THAT. THEY  
16 WOULD HAVE HAD TO PAY AN HOURLY FEE; AND LOOKING AT YOUR  
17 LODESTAR, THE TIME THAT WOULD HAVE HAD TO GO INTO IT, THEY  
18 WOULDN'T HAVE GOTTEN ANYTHING OUT OF IT. THEY WOULD HAVE HAD  
19 TO PAY A HIGHER CONTINGENCY.  
20 SO WHILE I RECOGNIZE MANY FOLKS OUT THERE DON'T  
21 APPRECIATE THE ROLE THAT YOU HAVE PLAYED IN THIS AND THEY SEE

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22 THIS AS LAWYERS JUST GETTING RICH AT THE EXPENSE OF THE VICTIMS  
23 OF WHAT HAS OCCURRED HERE, I HONESTLY SEE BEYOND THAT AND THINK  
24 THAT YOU HAVE DONE A REAL SERVICE BY REPRESENTING THESE FOLKS,  
25 AND I THINK THEY HAVE GOTTEN A DEAL IN IT. AND SO THANK YOU

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1 FOR YOUR WORK ON THE FILE.

2 AND I APPRECIATE THE DEFENDANTS, AS WELL, BEING  
3 WILLING TO COME TO THE TABLE AND GET A RESOLUTION OF THIS.

4 I'VE SIGNED THE ORDER. I WILL LET YOU FILE IT, AND  
5 THAT WILL CLOSE THE MATTER. THANK YOU, AND HAVE A GOOD DAY.  
6 WE'RE ADJOURNED.

7 (PROCEEDINGS CONCLUDED.)

8 \* \* \*

9 REPORTER'S CERTIFICATION

10 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE  
11 RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

12

13 \_\_\_\_\_  
14 SHARON D. UPCHURCH, RPR  
15 OFFICIAL COURT REPORTER  
16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF GEORGIA

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19 DATE: \_\_\_\_\_

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